

Claimant testified that on the morning of the accident he moved a shovel and a coworker's water jug which he thought were too close to where the backhoe was operating. After setting these items aside, he turned and was struck in the head. According to claimant, he thought that he had been hit by the backhoe. The records from the subsequent emergency room visit show that coworkers advised emergency room personnel that claimant was struck by a backhoe bucket. Those records also refer to the possibility that claimant was assaulted. From claimant's testimony, it appears he did not know from his own observations what struck him.

Respondent has introduced a complaint filed with the Topeka Human Relations Commission by a coworker. In that complaint, a coworker, John L. Williams, Jr., states that claimant poured a foreign substance into his water canteen and that a physical altercation between himself and claimant occurred. Based upon the version stated in this complaint, respondent asserts that the claim is not compensable.

While the Board agrees that the version given in the complaint, absent other circumstances, would not be a compensable claim, the Board also agrees that the testimony of the claimant does establish a compensable claim. Claimant does not recall all of the events, but he denies putting anything in the coworker's canteen. If claimant was struck by the backhoe, the claim would be compensable. If claimant was struck by a coworker because he moved the coworker's canteen out of the way of the backhoe, the claim would be compensable. As the Board views the testimony, the events that claimant does recall would, if believed, make the claim compensable. The Board has relied upon claimant's testimony for two reasons. First, the Administrative Law Judge, who had the opportunity to observe that testimony, has apparently found it credible. Second, the contradictory evidence is in the form of an affidavit which, although admissible, has not been subject to cross examination.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the March 25, 1998 Order by Administrative Law Judge Floyd V. Palmer should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of May 1998.

BOARD MEMBER

c: Robert W. Harris, Kansas City, KS
D'Ambra M. Howard, Overland Park, KS
Office of Administrative Law Judge, Topeka, KS
Philip S. Harness, Director